

Questions we expect EPA and Corps will be asked

1. Do you think that it is clear that water bodies will be jurisdictional if located in a floodplain, but the extent of the floodplain is left to the judgment of the agencies' field staff and there is no requirement that they use a specific frequency, like the five-year floodplain?
2. How can anybody tell where the riparian area ends, given that the definition you've put forward says that it is an area "where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area"? Can you point to areas where surface or subsurface hydrology do not have such an effect?
3. Numerous municipalities have called on the agencies to exempt features that are part of municipal separate storm sewer systems. Will you do that? If not, how will MS4 components be regulated? Will ditches that are part of MS4s need to have water quality standards and TMDLs?
4. Many cities construct wetlands and swales for water quality purposes, but will not do so if those things are regulated as waters of the US. Why would the agencies discourage these best practices aimed at improving clean water?
5. What water bodies do you think don't have a significant nexus to navigable water bodies?
6. EPA reluctantly produced maps of different water bodies to the House Science Committee last year, but claimed they were not indicative of what would be covered by the new rule. If that's not what they are, what do the maps represent, and why did EPA have the maps made?
7. The Office of Advocacy in the Small Business Administration concluded that the agencies improperly certified that the rule will not have a significant economic impact on a substantial number of small entities. It found that the agencies used an invalid baseline – the existing rules that are not being enforced – and ignored direct costs the rule imposes. As a result, the failure to convene a Small Business Advocacy Review panel is a violation of the Regulatory Flexibility Act, and Advocacy advises that the agencies need to withdraw the rule and comply with the Act. Will you do so?
8. The Brattle Group conducted a review of the agencies' economic analysis and identified numerous flaws. As summarized by the Waters Advocacy Coalition, those flaws include: (a) "the agencies cannot accurately quantify the proposed rule's increase in jurisdiction by using the ORM2 database because the database only accounts for the section 404 program, and its data do not fit this exercise"; (b) it fails to account for the fact that "landowners and project proponents would not have sought JDs for most of the features that would now newly be considered 'waters of the United States' under the proposed rule, such as ditches and ephemeral washes"; (c) "the Economic Analysis relies on figures extrapolated from statistics

from FY 2009-2010, a period of extremely low construction activity”; (d) the analysis omits the costs of avoidance and delay, which are likely the largest out-of-pocket expenses of the permitting process ... [and] ignores the cost impact of the changes to other CWA regulatory programs”; and (e) “the benefit transfer analysis used to approximate section 404 benefits is poorly documented and not consistent with best practices in environmental economics.” Given these problems, why should we believe any aspect of the analysis?